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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al.,

Plaintiffs,

vs.

FACEBOOK, INC.,

Defendant.

Case No. 20-CV-08570-LHK

**ADVERTISER PLAINTIFFS'  
RESPONSE IN SUPPORT OF  
MOTION FOR APPOINTMENT OF  
INTERIM CO-LEAD COUNSEL AND  
EXECUTIVE COMMITTEE TO  
REPRESENT PROPOSED  
ADVERTISER CLASS**

Date: March 18, 2021  
Time: 1:30 p.m.  
Courtroom: 8

VICKIE SHERMAN, et al.,

Plaintiffs,

vs.

FACEBOOK, INC.,

Defendant.

Case No. 20-CV-08721-LHK

RACHEL BANKS KUPCHO,  
Plaintiffs,  
vs.  
FACEBOOK, INC.,  
Defendant.

Case No. 20-CV-08815-LHK

JESSICA L. LAYSER,  
Plaintiffs,  
vs.  
FACEBOOK, INC.,  
Defendant.

Case No. 21-CV-00337-LHK

AFFILIOUS, INC., et al.,  
Plaintiffs,  
vs.  
FACEBOOK, INC.,  
Defendant.

Case No. 20-CV-09217-LHK

DEBORAH DAMES, et al.,  
Plaintiffs,  
vs.  
FACEBOOK, INC.,  
Defendant.

Case No. 20-CV-08817-LHK

CHARLES STEINBERG,  
Plaintiffs,  
vs.  
FACEBOOK, INC.,  
Defendant

Case No. 20-CV-09130-LHK

1 RITA GARVIN,

2 Plaintiffs,

3 vs.

4 FACEBOOK, INC.,

5 Defendant.

Case No. 21-CV-00618-LHK

6 JOE KOVACEVICH,

7 Plaintiffs,

8 vs.

9 FACEBOOK, INC.,

10 Defendant.

Case No. 21-CV-01117-LHK

1 Plaintiffs Katherine Loopers, Jarred Johnson, Affilious, Inc., Jessyca Frederick, NJ Premier  
 2 Inc., Timothy Mills, Mark Young, Danny Collins, Joshua Jeon, 406 Property Services, PLLC,  
 3 Mark Berney, MarQuisha Cork, Jessica L. Layser, and Mark K. Wasvary, P.C. (collectively,  
 4 “Advertiser Plaintiffs”) submit this Response in Support of their Motion for Appointment of  
 5 Interim Co-Lead Counsel and Executive Committee to Represent the Proposed Advertiser Class.

6 The Court received five motions supporting three leadership slates<sup>1</sup> in response to its Order  
 7 inviting firms to submit applications for appointment of interim lead counsel. While all plaintiffs  
 8 recognize that the Court enjoys broad discretion in appointing interim lead counsel under Fed. R.  
 9 Civ. P. 23(g), all applicants agree that because Facebook advertisers and users participate in  
 10 different relevant markets and are seeking distinct relief, the appointment of separate interim class  
 11 counsel for the advertiser and user cases would best serve the interests of proposed classes. *See*  
 12 Advertiser Plaintiffs’ Motion, ECF No. 58, at 2-6; Klein Plaintiffs’ Motion, ECF No. 55, at 24-25;  
 13 Steinberg Plaintiffs’ Motion, ECF No. 56, at 3; Dames Plaintiffs’ Motion, ECF No. 57, at 2;  
 14 Kupcho Plaintiff’s Motion, ECF No. 59, at 1, n.1.

15 Advertiser Plaintiffs’ Motion seeks the appointment of Ahdoot & Wolfson, PC,  
 16 Scott+Scott Attorneys at Law LLP, and Levin Sedran & Berman LLP as interim co-lead counsel  
 17 to lead advertiser cases and an executive committee made up of Bathaee Dunne LLP and Reinhardt  
 18 Wendorf & Blanchfield. ECF No. 58. Advertiser Plaintiffs’ motion – a product of private ordering  
 19 supported by all 14 Advertiser Plaintiffs – is unopposed. *See* MANUAL FOR COMPLEX LITIGATION  
 20 (FOURTH) § 21.272 (private ordering is when “lawyers agree who should be lead class counsel and  
 21 the court approves the selection after a review to ensure that the counsel selected is adequate to  
 22 represent the class interests”).

23 With regard to the user cases, two competing groups seek appointment as interim lead  
 24 counsel: (1) plaintiffs Maximilian Klein and Sarah Grabert (“Klein Plaintiffs”) seek appointment  
 25 of Quinn Emmanuel Urquhart & Sullivan, LLP and Keller Lenkner LLC (ECF No. 55); and (2)

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26 <sup>1</sup> Plaintiff Charles Steinberg (“Steinberg Plaintiff”), represented by Barrack, Rodos &  
 27 Bacine, and plaintiffs Deborah Dames and Timothy Matthews (“Dames Plaintiffs”), represented  
 28 by Kessler Topaz Meltzer & Check, LLP, each submitted separate motions in support of the Klein  
 Plaintiffs’ application. ECF Nos. 56, 57.

1 plaintiff Banks Kupcho (“Kupcho Plaintiff”) seeks appointment of Hagens Berman Sobol Shapiro  
 2 LLP and Lockridge Grindal Nauen P.L.L.P. (ECF No. 59). However, all user plaintiffs agree that  
 3 there should be separate interim lead counsel for the advertiser cases, and none of the user plaintiffs  
 4 oppose the appointment of Proposed Advertiser Counsel as interim lead counsel for advertisers.

5 As Advertiser Plaintiffs explained in their opening Memorandum and the filings of all  
 6 other counsel support, the claims of Facebook advertisers and users allege distinct and unique  
 7 harms in separate relevant markets; have an overlapping but different factual focus; will require  
 8 separate expert analysis; will have different measures of damages; will seek differing, if not  
 9 inconsistent, equitable or injunctive relief; and may diverge in the event of settlement. Advertisers  
 10 Plaintiffs’ Motion, ECF No. 58, at 2-5. These and other differences between the advertiser and  
 11 user cases create tensions that strongly support appointing separate counsel to lead these separate  
 12 tracks.

13 As set forth in Advertiser Plaintiffs’ Motion (ECF No. 58), the recent Google and Apple  
 14 app store cases pending in this District are highly instructive. *Id.* at 4-5. Under similar  
 15 circumstances, in both cases, the district court appointed separate interim co-lead counsel to  
 16 represent separate developer and user plaintiff tracks. Advertisers Plaintiffs’ Motion, ECF No. 58,  
 17 at 4-5. Further, in those cases, the courts ordered separate consolidated complaints on behalf of  
 18 each of the two plaintiff groups.<sup>2</sup> This approach follows a long line of cases in which courts,  
 19 including those in the Ninth Circuit, have ordered the filing of separate consolidated complaints in  
 20 the context of separately situated plaintiffs in related litigation, such as direct and indirect  
 21 purchaser plaintiffs in antitrust actions. *See, e.g., In re Korean Air Lines Co., LTD., Antitrust*

22 <sup>2</sup> Notes and Order, *In re Google Play Developer Antitrust Litig.*, No. 3:20-cv-5792-JD, ECF  
 23 No. 53, slip op. (N.D. Cal. Oct. 9, 2020) (ordering that plaintiffs in the developer cases will file a  
 24 consolidated amended complaint); Notes and Order, *In re Google Play Consumer Antitrust Litig.*,  
 25 No. 3:20-cv-5761-JD, ECF No. 53, slip op. (N.D. Cal. Oct. 9, 2020) (ordering that plaintiffs in the  
 26 consumer cases will file a consolidated amended complaint); Order Granting Stipulation  
 27 Consolidating Related Developer Cases For All Purposes, *Cameron v. Apple Inc.*, No. 4:19-cv-  
 28 3074-YGR, ECF No. 72, slip op. at ¶¶2, 4 (N.D. Cal. Nov. 5, 2019) (designating one complaint as  
 the operative complaint for all developer actions); Order Granting Stipulation Consolidating  
 Related Consumer Cases For All Purposes, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-6714,  
 ECF No. 183, slip op. at ¶¶2, 4 (N.D. Cal. Oct. 29, 2019) (designating one complaint as the  
 operative complaint for all consumer actions).

1 *Litig.*, 642 F.3d 685, 690 (9th Cir. 2011) (noting the district court initially ordered direct and  
 2 indirect purchasers to file one consolidated complaint and later accepted indirect purchasers'  
 3 application to file a separate consolidated complaint on behalf of indirect purchasers only).<sup>3</sup>

4 Advertiser Plaintiffs respectfully submit that the filing of separate consolidated complaints  
 5 would best advance the competing interests of the advertiser and user plaintiffs and proposed  
 6 classes because the two plaintiff groups are likely to face pleading issues unique to each of them,  
 7 such as, among other things, antitrust standing and market definition. Accordingly, Advertiser  
 8 Plaintiffs seek to file a separate consolidated complaint on behalf of the proposed advertiser class.  
 9 Advertiser Plaintiffs' Motion, ECF No. 58, at 2-3.

10 Finally, despite recognizing the agreed-upon differences in the two cases and supporting  
 11 appointment of separate counsel, in the final sentence of their brief, the Klein Plaintiffs make an  
 12 alternative request that Quinn Emanuel and Keller Lenkner be appointed as interim lead counsel  
 13 for all plaintiffs in the event that the Court disagrees with their argument for separate appointments  
 14 and decides to appoint common class counsel. *See* Klein Plaintiffs' Motion, ECF No. 55, at 25.  
 15 Advertiser Plaintiffs oppose this request because the interests of the Advertiser Plaintiffs need to  
 16 be represented by counsel who represent advertisers, and who have researched, advanced, and are  
 17 most familiar with their claims. The Klein Plaintiffs' counsel (as well as counsel for the Steinberg,  
 18 Dames, and Kupcho Plaintiffs) represent only Facebook users. Counsel for users made a  
 19 considered choice to pursue damages and injunctive relief theories distinct from those likely to be  
 20 pursued by the advertisers. Proposed Advertiser Counsel respectfully submit that one or more of  
 21 their firms should be considered for a leadership role in a common representation structure, should  
 22 the Court adopt one, and any common representation structure should contain equal representation  
 23 for both sets of plaintiffs.

24  
 25 <sup>3</sup> *See also In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL  
 26 4955377, at \*1–2 (N.D. Cal. Oct. 2, 2014) (separate consolidated amended complaints filed for  
 27 direct and indirect purchasers); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580  
 28 F. Supp. 2d 896, 898 (N.D. Cal. 2008) (same); *In re Flash Memory Antitrust Litig.*, No. C 07-0086  
 SBA, 2008 WL 62278, at \*1 (N.D. Cal. Jan. 4, 2008) (same); *In re Graphics Processing Units*  
*Antitrust Litig.*, 540 F. Supp. 2d 1085, 1088 (N.D. Cal. 2007) (same).

Moreover, it may be the case that a consolidated advertiser complaint will include subclasses with separate representatives proposed for each, consistent with best practices. Ahdoot & Wolfson, Scott+Scott, and Levin Sederin & Berman – the only firms representing advertisers – are best suited to ensure that the Advertiser Plaintiffs’ claims are presented in the best manner possible.

As set out in Advertiser Plaintiffs’ opening Memorandum, all three firms meet each of the Rule 23(g)(1)(A) factors and possess the experience, knowledge, and resources to best represent the proposed advertiser class.

Respectfully submitted,

DATED: March 10, 2021

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